In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 342.

ROBERT R. YOUNG,
Petitioner,

vs.

THE HIGBEE COMPANY,
WILLIAM W. BOAG and J. F. POTTS,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT J. F. POTTS.

MARVIN C. HARRISON,
Guardian Building,
Cleveland, Ohio,

PAUL S. KNIGHT,
Williamson Bldg.,
Cleveland, Ohio,
Attorneys for Respondent,
J. F. Potts.

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COUNTER STATEMENT OF THE GENERAL NATURE OF THE CASE.

In the Petitioner's Brief, the statements of fact are in some respects so inaccurate, and in many others, so incomplete and misleading, that it will be necessary for us to restate the Facts which are involved in this case with considerable particularity.

As indicated in Petitioner's Brief, this case grows out of a corporate reorganization in Bankruptcy.

An Amended Reorganization Plan was approved by *all* of the Preferred Stockholders of the corporation, with only two exceptions.

After the Plan had been approved and confirmed by the District Court (Judge Paul Jones) these two dissenting Preferred Stockholders (the present respondents) filed their individual appeal to the Circuit Court of Appeals.

While their appeal was pending, it became a pawn in a financial battle between the Petitioner, Robert

R. Young, on the one hand, and Charles A. Bradley and John Murphy (who were co-respondents in the lower courts) on the other hand.

The details of this battle, and the manner in which the appeal became a pawn in this financial chess game, are set out in detail in the Master's Report (228-248) and will be explained at some length in the Counter-Statement of Facts.

At this point it is enough to say that Bradley and Murphy were placed in a position such that they were obliged to raise a half million dollars within a very few days or find their interests in The Higbee Company sold at public auction by Petitioner Young.

The pendency of the appeal threw such doubt upon the finality of the corporate reorganization that the banks would not lend Bradley and Murphy any money with which to save themselves.

In this situation a "foot-race" developed, in which Bradley and Murphy competed with Petitioner Young for the purchase of the stock of the appellants. Bradley and Murphy wanted the stock so that they could *dismiss* the appeal.

Petitioner Young attempted as diligently to buy the stock, so as to make sure that the appeal would *not* be dismissed.

In other words, Bradley and Murphy were desperately anxious to buy the stock—so that they could dismiss the appeal—so that they could borrow $500,000.00—and so that they could save their financial skins.

Petitioner Young was equally anxious to get the stock—so that the appeal would *not* be dismissed—so that his enemies Bradley and Murphy could *not* borrow the $500,000.00 which they needed—so that their securities could be and would be sold at public auction—and so that he (Petitioner Young) could bid them in.

In short, the immense value of the stock which was owned by the appellants, and the immense significance of

the appeal which they had filed, had no relationship at all to the merits or lack of merits of the appeals, and did not concern at all any of the rights or interests of The Higbee Company or the other Preferred Stockholders.

For purely fortuitous reasons, this stock (and the right to control the appeal filed under it) had acquired great value.

Bradley and Murphy won the "foot-race," and bought the stock, and paid an amount which was substantially greater than its market value.

As soon as they had the stock they immediately took steps to dismiss the appeal.

Petitioner Young—having lost the "foot-race"—sought desperately to prevent the dismissal. He appeared before the Circuit Court of Appeals in Cincinnati, and there was an extensive hearing before that court.

Petitioner Young—at that time, and in that hearing—sought (a) to intervene in the appeal, as a Preferred Stockholder; and (b) to object to the dismissal of the appeal filed by the respondents.

The Circuit Court of Appeals after full hearing, decided that Bradley and Murphy had the right to dismiss the appeal of the respondents; and with respect to Petitioner Young's application to intervene, it made this order:

> "The application of Robert R. Young for leave to intervene, having been considered by the Court, it is now ordered that said application be and the same is denied." (16.)

With the dismissal of the appeal, the Corporate Reorganization became final, and on the day following (March 12, 1942), Bradley and Murphy borrowed $566,000.00 from The National City Bank of Cleveland with which they immediately made tender to the corporation to which they owed the money, and in which Petitioner Young was dominant. (Ad Interim Report of Master, Findings Nos. 35-40, p. 246.)

Petitioner Young having failed to prevent these respondents Potts and Boag from selling the stock to Bradley and Murphy—and having thus failed to keep the appeal pending,—and having also failed to secure permission to intervene in the appeal, he filed an application in the Bankruptcy proceedings before the District Court for authority to file an action against Potts and Boag to compel them to disgorge to the Higbee Company or its Preferred Stockholders the amount which they had received from Bradley and Murphy in excess of the reasonable market value of their stock. (2, 3.)

In support of this application Petitioner Young claimed that in making their appeal, Potts and Boag were acting in a representative and fiduciary capacity on behalf of *all* the Preferred Stockholders, and that they therefore owed to those other Preferred Stockholders, as *cestuis que trust*, the profits of the transaction.

The basic premise of this claim—that Potts and Boag were acting on behalf of all the Preferred Stockholders in making the appeal—was obviously a factual rather than a legal issue. It was referred to a Master who made a long report.

This Report, with Special Findings of Fact, and Conclusions of Law is in the Record at pages 228-248.

In substance, however, it found specifically against the Petitioner's claims of fact, and found to the contrary that the appeal which was filed by Potts and Boag was filed by them in their individual rights and capacities; and was *not* filed by them on behalf of any of the other Preferred Stockholders.

> "10. Upon their resignation as members of said Committee, Potts and Boag solicited the support of other preferred stockholders to join them in opposing the provisions of the Amended Plan of Reorganization relating to the treatment of the Junior Indebtedness; which solicitation was unsuccessful and *no one joined with or authorized Potts and Boag to act for them.*

11. Thereafter, and on December 18, 1940, and thenceforth until the dismissal of their appeal by the Circuit Court of Appeals on March 11, 1942, Potts and Boag, *solely in their individual capacities, and not as representing other interests or rights, prosecuted their objections and exceptions* to the confirmation of the Amended Plan of Reorganization.

* * * * *

13. At the time of filing of these exceptions *Potts invited Young to join therein and Young refused.*

14. After the institution by Young and Kirby of said suit against Bradley and Murphy on May 28, 1941, *Young stated to Potts that he was not interested in the objections and exceptions* theretofore filed by Potts and Boag to the confirmation of the Amended Plan of Reorganization because it was to his (Young's) interest to have Bradley and Murphy get all they could for said securities under the Amended Plan of reorganization so that there would be that much more for Young to try to take away from them.

* * * * *

18. On November 14, 1941, *Potts and Boag, acting on behalf of themselves only, appealed* to the United States Circuit Court of Appeals from the order of the United States District Court confirming the Amended Plan of Reorganization of The Higbee Company.

* * * * *

37. The evidence offered fails to show that Potts and Boag represented any other stockholders than themselves and in the filing of objections to the confirmation of the Amended Plan of Reorganization and *in the prosecuting of their appeal* from the order of the United States District Court confirming the Amended Plan of Reorganization, said *Potts and Boag acted only for themselves individually, and not as the representatives of a class and their appearance in these proceedings was at no time derivative in its nature or effect.*" (246.)

This report of the Master was confirmed (with unimportant changes) by the District Court. (252-256.)

And on appeal, that judgment was affirmed by the Sixth Circuit Court of Appeals in a memorandum opinion (264, 265) which concluded with this language:

> "And *it appearing from the findings of the master, confirmed by the District Court, and supported by the evidence, that Potts and Boag* represented no other stockholders than themselves and *acted only for themselves individually and not as representatives of a class*, both in the filing of objections to the confirmation of the amended plan of reorganization and in prosecuting their appeal from the court's order confirming the amended plan of reorganization, *and at no time asserted a derivative right belonging to the debtor*;
>
> It is ordered that the order of the District Court * * * be, and it is in all things, affirmed."

QUESTIONS PRESENTED.

Here also, it seems to us that the Petitioner has stated the questions which are involved in a manner which is both inadequate, and inaccurate. On page 4 of his Brief, he states the "Questions Presented" as follows:

> 1. After Potts and Boag had represented to the Court and to the Higbee preferred stockholders that they were acting as a committee in the interests of all preferred stockholders, can they thereafter accept and retain for themselves individually a $100,000 consideration for permitting the dismissal of an appeal which they had taken from a decree confirming the Amended Plan of Reorganization of The Higbee Company?
>
> 2. Should Potts and Boag be required to pay over to The Higbee Company for its First Preferred Stockholders the aforesaid $100,000 consideration which they received for permitting the dismissal of the appeal?

These questions *assume* that "Potts and Boag had represented" that they were acting in a representative capacity.

That assumption is contrary to the explicit findings of fact made by the lower courts.

Obviously, if the lower courts had found that the Petitioner was right in his basic claim of fact, that the appeals were filed on behalf of other stockholders, and that in making the appeals, Potts and Boag were acting in a representative or derivative capacity, the conclusion might have been otherwise.

But the real truth of the matter is that the Petitioner is now seeking to argue in this Court that the findings of fact in the trial court were contrary to the weight of the evidence.

Surely it is elementary that that matter is not now open to debate in this Court.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

In contradistinction to the Statement of Questions Presented in Petitioner's Brief, we suggest that they can be more accurately stated as follows:

1. In filing their appeal, were the respondents Potts and Boag acting only for themselves—or were they acting in a representative capacity?

2. Assuming (as the lower courts have found) that they were acting only for themselves, was there any obligation, nevertheless, to account over (a) to the debtor corporation; or (b) to the other Preferred Stockholders?

3. Assuming (arguendo) that Potts and Boag could not dismiss their appeal to the prejudice of the other Preferred Stockholders without accounting over, was there any showing that those Preferred Stockholders were in fact prejudiced by the dismissal?

4. Assuming (arguendo) that there might, in some situations, be an obligation to account over to the corporation or to the other Preferred Stockholders, does that claim fail because of the particular facts of this case; specifically

(a) because all of the other Preferred Stockholders approved the Amended Plan of Reorganization; or

(b) because the sale of the stock was for reasons wholly irrelevant to the rights and interests of the corporation and the other Preferred Stockholders; or

(c) because of the former decision of the Circuit Court of Appeals, acting as collateral estoppel?

COUNTER STATEMENT OF FACTS.

As already indicated, the Statement of Facts in Petitioner's Brief is, in some respects, seriously incorrect; and in others wholly inadequate and misleading. This compels us to restate the operative facts with considerable detail.

At the outset it may be pointed out that there is one basic fallacy which pervades the Petitioner's Brief, and that is the assumption that the matter is to be judged by the best possible interpretation of the evidence *from the Petitioner's point of view.*

Inasmuch as findings of fact have been made by the Master, and by the District Court (and affirmed by the Circuit Court of Appeals) which are plainly contrary to the contentions of the Petitioner, we assume that it is elementary that these findings are to be considered and tested by the best possible interpretation of the evidence *from the Respondents' point of view.*

In other words, if there is any substantial evidence in the Record to support the findings of the lower courts, it is a matter of no concern at all, that there is also other evidence from which opposite findings might conceivably have been made.

This litigation represents one phase of the almost innumerable controversies which grew out of the spectacular rise of the Van Sweringens in Cleveland finance, and their later and equally spectacular collapse.

The Higbee Company is a corporation, which for many years has operated a large department store in the City of Cleveland.

The Van Sweringens secured dominant control of this concern, and caused the store to be moved from its old location to their huge new Terminal area. In this new location, and at about the same time as the whole financial empire of the Van Sweringens was collapsing, The Higbee Company got into financial difficulties, and eventually corporate reorganization proceedings were instituted pursuant to Chapter X of the Bankruptcy Act.

These proceedings were before Judge Paul Jones, Judge of the United States District Court in Cleveland, and dragged on for a period of several years from 1938 to 1942, while the various competitive interests argued their rights to recognition in the reorganized status of the company.

On September 30, 1935, the firm of J. P. Morgan & Co. held their famous auction of Van Sweringen securities, and among other items, certain unsecured obligations of The Higbee Company (frequently referred to in the Record as *The Junior Indebtedness*) were sold to a concern known as Midamerica Corporation. This Junior Indebtedness had a face value of substantially $1,500,000.00. (116, 239.) At the time, this concern was controlled by The George and Frances Ball Foundation. (240.)

On June 4th, 1937, the Junior Indebtedness was sold by the Ball Foundation to Charles L. Bradley and John P. Murphy for a price of $600,000.00. Of this amount $60,000.00 was paid in cash and the balance of $540,000.00 was represented by a note secured by a pledge of the Junior Indebtedness. (116, 240.)

One of the principal points of controversy in the Higbee reorganization centered around this Junior Indebtedness which was thus acquired by Bradley and Murphy.

Bradley and Murphy were officers of Midamerica at the time it was bought from J. P. Morgan & Co.

Bradley was also a director of The Higbee Company at that time.

Should this claim for $1,500,000.00 be recognized in its full amount?

Or only for the amount paid by Bradley and Murphy, to-wit, $600,000.00?

Or not at all?

Had there been a breach of fiduciary duties by Bradley and Murphy which were owed to The Higbee Company and which affected their rights in the reorganization?

These questions were bitterly argued throughout the reorganization proceedings.

In this controversy the respondents Potts and Boag took a leading position. They owned 250 and 10 shares respectively of the First Preferred Stock of The Higbee Company, and they constantly urged that Bradley and Murphy were not entitled to any recognition whatever, so far as the Junior Indebtedness was concerned; but that if it was to be recognized at all, it should be recognized only to the extent of the money they had actually paid for it, to-wit, $600,000.00.

In order to make his opposition effective, Respondent Potts helped to organize a protective committee which bore the name of the "New Preferred Stockholders Committee." This committee was organized in 1938, and took its name of the "New Preferred Stockholders Committee" in contradistinction to a so-called "Committee of Preferred Stockholders" which it was believed and asserted by respondent Potts was dominated and controlled by the Bradley and Murphy interests.

This so-called "New Preferred Stockholders Committee," was organized in large part by respondent Potts, and on August 8, 1939 it filed objections to the claims of Bradley and Murphy. These objections are in the Record, pp. 81-87.

So far as this "New Preferred Stockholders Committee" was concerned, there is no doubt that it, and all of the persons participant in it, purported to be acting for and on behalf of the Preferred Stockholders of the Higbee Company.

Several years of controversy ensued, and many if not most of the objections of that "New Preferred Stockholders Committee" were decided favorably to that committee.

Eventually an *Amended* Plan of Reorganization was submitted on September 27, 1940. (100.)

Respondents Potts and Boag were still dissatisfied with its terms.

But their committee, The New Preferred Stockholders Committee, despite their objections, decided to approve and support the Amended Plan of Reorganization; and the lawyers for the Committee gave official notice to the Court of that approval and support. (176.)

In that situation, with their own committee officially supporting the proposed Amended Plan of Reorganization, respondents Potts and Boag resigned from the Committee and *personally, and on their own behalf alone*, filed Objections to the Amended Plan of Reorganization. These objections were filed by them on November 22, 1940. The objections are set out in full in the Record, pp. 100-103, and their Brief in support of the Objections, at pp. 104-112.

These Objections show on their face that respondents Potts and Boag were acting and were purporting to act for themselves alone.

> "Now come J. F. Potts and William W. Boag, and represent to the court that they are the owners of 250 shares and 10 shares of the First Preferred Stock of

> the Higbee Company, debtor herein; that they were until November 7th, 1940, members of the new Preferred Stockholders Committee of the Higbee Company; that they herewith file their objections to the Amended plan of reorganization of The Higbee Company, dated, September 27th, 1940, as follows * * *."

A month later, these respondents Potts and Boag,—still acting only for themselves—filed an application to have Special Counsel appointed to represent the debtor, The Higbee Company, and in this application they contended that The Higbee Company was represented by lawyers who were unduly dominated by the interests seeking to gain recognition for the Junior Indebtedness.

This Application, and the briefs in support of it, appear in the Record, 112-121, and also show on their face that respondents Potts and Boag were acting and were purporting to act, only for themselves.

Despite their personal objections, and arguments, the Special Master to whom the matter had been submitted, made a Report recommending approval of the Amended Plan of Reorganization; and on Febr. 10, 1941, respondents Potts and Boag filed their own Objections and Exceptions to this Report of the Special Master.

These Objections and Exceptions, and the Brief in support of them are in the Record, pp. 121-146, and they also are quite clearly made and urged by the respondents Potts and Boag *in their own personal behalf.*

> "Now come J. F. Potts and William W. Boag, holders of 250 shares and 10 shares respectively of the First Preferred Stock of the debtor, and respectfully object and except to the ad interim Report of the Honorable William B. Woods, Special Master recommending approval of the Amended Plan of Reorganization, etc. * * *." (122.)

A copy of these Objections and Exceptions and Brief in support, was served upon "Harvey O. Mierke, Chairman

of Committee of Preferred Stockholders"; and also upon "Bloomfield & Orr, Attorneys for New Committee of (Perferred) Stockholders." (125.)

On May 27, 1941, Judge Paul Jones decided to remand the matter to the Special Master for a further consideration of some phases relating to the Junior Indebtedness. His opinion appears in the Record, 172-174, and his formal order of remand was signed on June 10, 1941. (174.)

The Higbee Company filed a Motion for New Trial, and respondents Potts and Boag filed a Brief opposing the granting of this Motion. This Brief was also filed on their own behalf, and did not purport to be on behalf of any one else. (164-171.)

On July 2, 1941, Judge Jones vacated his order of June 10th, 1941. (174.)

It was at this point, that respondents Potts and Boag decided to try to organize another Protective Committee.

They got out a letterhead, which appears in the Record, at p. 172, and which bears the legend

INDEPENDENT PREFERRED STOCKHOLDERS' COMMITTEE OF THE HIGBEE COMPANY.

Committee	*Counsel*
J. Fred Potts	J. Fred Potts
William W. Boag	John H. McNeal
John W. Joughin	

On this letterhead they sent out a letter to the Preferred Stockholders urging them to oppose the Amended Plan of Reorganization and to vote against it. (172-178.)

Despite this effort to interest other Preferred Stock Holders in fighting the Amended Plan of Reorganization, and despite the fact that they had a few letters of inquiry from other Preferred Stock Holders (187) there were no others who voted to disapprove the Plan.

As stated by Judge Jones in his Memorandum of June 10, 1943, (252):

"The Higbee Company Plan of reorganization long since has been confirmed and *was acceptable to every interest, except* to preferred stockholders *Potts and Boag* who appealed from the order of confirmation of this Court."

In an earlier memorandum of Sept. 3, 1942 (dealing with the application of respondent Potts for counsel fees—and *offered in evidence by the Petitioner*) Judge Jones said categorically:

"*All preferred shareholders accepted the Plan* of Reorganization, after amendment in several respects, *except these applicants (Potts and Boag).*" (221.)

Or as stated by the Special Master, in his report of March 24, 1943 (233):

"Potts and Boag had the right as individuals to be heard on the confirmation of the Plan of Reorganization of this Debtor. In the proceeding *they did not claim they were acting for anyone but themselves.* While the proof shows they sought to form a committee, and sought help from others, *the evidence* fails to disclose that they were ever authorized to act for any other person, and *were acting solely on their own behalf.*" (233.) (Emphasis added.)

Indeed, John W. Joughin, the third member of their proposed Independent Committee, also abandoned the struggle, and left the field to Potts and Boag, alone.

"Q. Well now, after Mr. Joecken had in effect withdrawn from this committee, what did you and Mr. Boag do?

A. We filed our Notice of appeal." (186.)

Their Notice of Appeal (181) shows plainly that it was filed by respondents Potts and Boag in their individual capacity, and *not* as the Petitioner constantly assumes, on behalf of a Committee, or on behalf of the class of Preferred Stockholders.

While this Appeal was pending in the United States Circuit Court of Appeals, Bradley and Murphy found themselves in a serious financial jam, which compelled them to pay almost any sum for the stock of respondents Potts and Boag.

These reasons were wholly irrelevant to the merits of the Appeal, and throw a very revealing light upon the validity of the claims of the Petitioner to be representing the interests of the Preferred Stockholders in this litigation.

When Bradley and Murphy acquired the Junior Indebtedness, from the Ball Foundation, on June 4th, 1937, they paid $60,000.00 in cash and signed a note calling for the further payment of the balance of $540,000. This note was secured by a pledge of the Junior Indebtedness.

This note representing the balance of $540,000.00 was in turn transferred by the Ball Foundation to interests which were controlled by the Petitioner, Robert R. Young. This transfer to Young was on March 2, 1942. (49.)

There was at that time bitter hostility between Petitioner Robert R. Young on the one hand, and respondent Charles Bradley on the other.

On the day following, March 3d, 1942, Petitioner declared the demand note due.

> Q. Now you acquired it on March 2. When was it that you declared the note due and notified Bradley and Murphy that you were going to sell the collateral?
>
> A. We sent notices under date of March 3. (50.)

They not only sent notices that the demand note was due, but that it would be sold at public sale on the Cleveland Courthouse steps ten days later, on March 13th, 1942. (21.)

The immediate further history of the matter is set out succinctly in the Master's Special findings:

> "6. Under date of March 3, 1942, Young and Kirby * * * caused Midamerica to serve upon Bradley and

Murphy a notice in writing to the effect that it (Midamerica) was now the owner of the Bradley-Murphy note; that it declared the note immediately due and payable; that it would sell the collateral (consisting of said securities) on March 13, 1942; and that it reserved the right to bid for and purchase the collateral at the sale.

7. The Bradley-Murphy note on its face provided that in the event of public sale at a price greater than the amount due thereon, the holder of the note was under no obligation to pay or account to the makers thereof for such overplus or any part thereof."

(We interrupt the quotation from the Master's Report, to point out that by virtue of this provision in the note, Petitioner Young was in a position to bid at public sale up to *any* amount with entire impunity, since there was no duty to account for the proceeds, no matter how high the price might go.)

"20. The avails of said securities (in The Higbee Company under the Amended Plan of Reorganization) upon final confirmation thereof, constituted ample security for financing the payment to Midamerica of the Bradley-Murphy note in the principal amount of $540,000.

22. Young and Kirby knew, at the time when they caused Midamerica to serve on Bradley and Murphy said notice in writing on March 3, 1942, that the pendency of this appeal cast doubt upon the value of the Junior Debt of The Higbee Company under the terms of the Amended Plan of Reorganization." (242, 243.)

With the appeal pending, the banks would not lend Bradley and Murphy the money which they needed to save themselves.

"Negotiations had been carried on by Bradley and Murphy for the purpose of borrowing sufficient funds to finance the payment of the $540,000 note and we had been assured that the collateral was of sufficient value

to support a loan of that amount of money, but that because of the appeal which had been filed on behalf of Potts and Boag the final approval of the Amended Plan of reorganization was held up * * * and so long as that appeal was in existence the collateral was of little value for the purposes of security in borrowing large sums of money * * * and that as soon as the plan of reorganization was finally confirmed it would be a simple matter for Bradley and Murphy to finance the payment of the $540,000 note." (Testimony of Wykoff, 21, 22.)

It was in the light of this situation that the "foot race" took place between Petitioner Young, and Bradley and Murphy. As expressed by witness Wykoff, one of the lawyers for Bradley and Murphy:

"* * * As soon as the Realty Company had acquired the $540,000 note a *foot race* took place between Bradley and Murphy on the one hand, and Young and his associates on the other, to acquire the Potts and Boag stock and * * * it was rather obvious that perhaps we had run a little faster * * *." (Testimony of Wykoff, 22.)

When both groups were bidding for the stock, Petitioner Young made it clear that he would bid as high as Bradley and Murphy for it.

"Q. What occurred * * * when you (Potts) were talking with Mr. Purcell (lawyer for Mr. Young) that day?

A. * * * I told Mr. Purcell that we had been made an offer for our stock. It wasn't hay; that I didn't feel like telling him what it was; and he said that *his client would meet any offer that we had* * * *." (32.)

This was made the subject of a special finding (No. 26) by the Master who found:

"26. Thereafter, Young's counsel, Robert W. Purcell, conferred with Potts and Boag, at which time Purcell stated that Young would meet any offer that

Potts and Boag might receive from other sources for said Preferred Stock." (244.)

While Petitioner Young was thus trying to prevent Bradley and Murphy from getting the Potts-Boag stock, he was also busy trying to prevent them from borrowing money with which they might save themselves.

Young's lawyer (Mr. Purcell) told Potts in the course of their negotiations that they were "going to put propaganda on the street in an effort to prevent the borrowing of that money" by Bradley and Murphy. (32.)

The Record contains the statements which Young caused to be printed in public newspapers, threatening dire consequences to any one who might aid Bradley and Murphy. This evidence is in the Record at pp. 44, 77-79.

For example Mr. Purcell (Mr. Young's lawyer) testified:

> "Q. He (Young) put advertisements in the Cleveland papers and in the New York papers that he would hold anybody responsible who assisted them to finance?
>
> A. Well, he put certain notices in the papers. I didn't say that was propaganda." (44.)

One of the statements (published in The Cleveland News) and formally issued by Young, concluded with this threat:

> "It was and is the theory of our suit that the conduct of Bradley and Murphy constitutes a gross breach of fiduciary duty, and that any one joining with or assisting Bradley and Murphy in the perpetration or continuation of this wrong is equally liable to us. We shall hold any one so doing strictly accountable." (79.)

This statement was published on March 9, 1942, seven days after Young acquired the Bradley-Murphy note, six days after he had declared it due, and four days before he planned to sell it at public auction, at which time he expected to bid it in.

This was also two days before the Sixth Circuit Court of Appeals permitted dismissal of the Potts-Boag appeal, and refused to permit Young to intervene to keep the appeal alive.

ARGUMENT.

SUMMARY OF ARGUMENT.

1. The question as to whether or not respondents Potts and Boag, in filing their appeals, were acting for themselves only, or were acting in a representative or fiduciary capacity is a factual question only and inasmuch as it has been plainly and decisively answered by the lower courts is not open to argument in this Court.

2. When a stockholder files his individual appeal from confirmation of a plan of reorganization, he has the right to prosecute that appeal or dismiss the appeal without reference to the rights, or the interests, or the wishes of the corporation itself, or any other person. This is true because it is inherent in the right of the appeal itself, which is given by statute to each individual stockholder who is aggrieved, or fancies himself aggrieved.

3. Assuming (for the sake of argument) that there might be a duty to account over to the Corporation, or to some class of security holders who are especially and prejudicially affected by the dismissal of an appeal, this duty to account over could not in any event arise without an affirmative showing that the corporation or the class of security holders *had actually been prejudiced by the dismissal.* There was no such showing in this case.

4. Assuming further (for the sake of argument) that there might be a duty to account over to the Corporation, or to some class of security holders who were especially affected by the dismissal of the appeal, this duty to account over could not arise in this case because of three facts, any one of which would be fatal to the claims of the petitioner, to-wit:

(a) All of the Preferred Stockholders (except only Potts and Boag) approved the Amended Plan of Reorganization;

(b) The Sale of the Stock by Potts and Boag, and the high price which was secured, was for reasons wholly irrelevant to the rights or interests of the Corporation or the other Preferred Stockholders;

(c) The earlier decision of the Circuit Court of Appeals denying the right of Petitioner to intervene in the appeal, and permitting Bradley and Murphy to dismiss the Potts-Boag appeal serves as a collateral estoppel against the efforts of Petitioner to re-litigate the matter in this proceeding.

I. IN FILING THEIR APPEALS WERE RESPONDENTS POTTS AND BOAG ACTING ONLY FOR THEMSELVES, OR WERE THEY ACTING IN A REPRESENTATIVE CAPACITY?

As already stated in the Summary of Argument, we do not concede that this question can be raised in this Court.

The findings of the Master (228-248) which were approved and confirmed by the District Court (252) and affirmed by the Circuit Court of Appeals (264, 265) leave no room for further argument.

It must be accepted, therefore, that the Potts-Boag appeal was filed by them individually, in their own individual behalf, and not in any sense in a representative or derivative capacity.

II. ASSUMING THAT THE POTTS-BOAG APPEAL WAS FILED BY THEM PERSONALLY, AND IN THEIR INDIVIDUAL CAPACITY ONLY, DID THEY HAVE THE RIGHT TO DISMISS THE APPEAL, OR SELL THEIR STOCK TO SOME ONE ELSE WITH THE INTENTION OF DISMISSING THE APPEAL?

We submit that this question can not be decided by describing what happened in this case as the "sale of an appeal" to use the rhetorical and invidious phrase which is repeatedly employed by Petitioner in his brief.

It is perfectly obvious that a substantial part of the price which Potts and Boag received for their stock, was because of the plan of the buyer to cause the dismissal of their appeal.

It may be assumed (we should think) that the statute which gives the *right* to each aggrieved stockholder to file an appeal, does not impose upon him the *duty* (if he once files Notice of Appeal) to prosecute that appeal energetically, or indeed, to prosecute it at all.

Under Section 206 of Chapter X of the Bankruptcy Act, "any * * * stockholder of the debtor" has the "right to be heard on all matters arising on a proceeding under this Chapter * * *."

That "right" has frequently been construed to include the right of appeal, without any formal order of intervention. *In re Day & Meyer, etc.*, 93 Fed. (2d) 657; *In re Keystone Realty Holding Corp.*, 117 Fed. (2d) 1003; *Dana v. Securities Exchange Comm.*, 125 Fed. (2d) 542.

Surely it can not be argued that this "right" of appeal means that after the Notice of Appeal has been filed, there is a "duty" of energetic prosecution of the appeal.

If a stockholder files a Notice of Appeal, and then changes his mind, must he secure permission of the court to abandon it? or permission of the corporation? or permission of the other stockholders?

If he must prosecute it, how energetic must he be? And if impecunious, how shall he finance the prosecution of his own appeal?

It seems to us that the mere statement of these questions carries their own answer.

We submit that (unless and until the Congress shall provide otherwise) the *right* of appeal includes also the right to control the prosecution of the appeal; and the right also to discontinue or to refuse to prosecute it, upon any terms that seem acceptable to the appellant—irrespective of whether those terms are advantageous to him or not.

We submit further, that if the original appellant may refuse to prosecute his appeal for any reason that seems good to him, or for no reason at all, he may sell his stock, and that his assignee has the same unlimited right and power.

In a Brief filed by The Securities and Exchange Commission in support of certiorari in this case, it was urged that this sort of thing must be discouraged by requiring the profits of the transaction to be paid over to the Corporation or to the other Preferred Stockholders, or very dire results may happen in some cases.

> "It is our position on the merits that these liberalized provisions for investor participation must be interpreted as carrying with them concomitant responsibilities * * *. The decision (of the courts below) will have the effect of encouraging participants in reorganization proceedings to object to reorganization plans and to prosecute appeals therefrom even where they have no basis for believing that such objections are sound * * *." (Brief of S. E. C., pp. 12, 13.)

We should have thought that this criticism of the right of appeal would be more properly addressed to the legislative body which created the right.

Surely it goes without saying that the right of appeal cannot be given to "any * * * stockholder" without having that indiscriminate right subject to some occasional abuse. But we doubt if the responsibility for curing those abuses can be properly (or indeed wisely) placed in the hands of the courts.

It is the general rule—so far as we have been able to find—that when the law creates the general right of an appeal for a litigant, that right of appeal includes the right of "control" of the appeal. And that in turn includes the right of prosecution, or continuance, or dismissal.

We suggest as somewhat analogous to the situation at bar, the case of a disputed will in probate proceedings.

If a will is held to be valid but only one heir appeals, it is obvious that all of the other heirs will profit if the appeal is successful. In such a will contest in which only one of the heirs has filed an individual appeal,—if that appellant concludes to dismiss his appeal (for a good reason, or for a poor reason, or for no reason at all), have the other heirs (who could also have filed their appeals) any ground for complaint?

In *Storey v. Storey*, 120 Ills. 244, 11 N. E. 209 (1887), the Supreme Court of Illinois had occasion to consider that general situation. A will had been denied probate, and at a time when there was only one appeal pending, it was held that that appellant had the right to dismiss his appeal, even though by so doing he destroyed the rights of others who had no appeal pending. On this point the Supreme Court of Illinois said (pp. 216, 217):

> "It would be manifestly unjust * * * to take from an appellant through whose affirmative action and upon whose sole pecuniary responsibility an appeal had been perfected all control of such appeal in the appellate court * * *.
>
> "It is contended with great earnestness that Mrs. Farrand ought not to be permitted to withdraw her appeal * * * and thereby forever defeat the probate of this will * * *
>
> "To this it must be answered: If such would be the legal consequences, it does not lie in the mouth of Mrs. Storey to complain. The law gave her the undoubted right to appeal from the decision and judgment of the probate court denying probate of the will * * *."

To the same effect see *Senn v. Greundling*, 218 Ill. 458, 75 N. E. 1020 (1905), where it is said:

> "Any person interested in the will, may appeal to the circuit court. The party taking an appeal has a right to control his appeal, and to dismiss it at his pleasure, and in that event the judgment of the probate court is left in full force and effect."

III. ASSUMING FOR THE SAKE OF ARGUMENT THAT POTTS AND BOAG COULD NOT DISMISS THEIR APPEAL—TO THE PREJUDICE OF THE OTHER PREFERRED STOCKHOLDERS—WITHOUT ACCOUNTING OVER TO THEM FOR THE EXCESS PRICE OF THE STOCK, WAS THERE ANY SHOWING THAT THE CORPORATION OR PREFERRED STOCKHOLDERS WERE IN FACT PREJUDICED BY THE TRANSACTION?

It seems to us that the answer to this is obviously "No."

The Petitioner showed without dispute that Potts and Boag made a *profit*.

But that does not prove—nor indeed does it tend to prove—that the corporation, or the Preferred Stockholders had a reciprocal *loss*.

So far as this Record goes, there is nothing whatever to indicate that the dismissal of the appeal was prejudicial to the corporation or to the Preferred Stockholders in the slightest degree.

Surely there is nothing in the situation which requires the respondents to account over to the Preferred Stockholders on the major premise that the respondents' conduct has harmed them, when there is (in fact) not a scintilla of evidence of such harm.

Every one of the Preferred Stockholders (except only Potts and Boag) voted to accept the Amended Plan of Reorganization. (Memorandum of District Judge, 252.)

Even Petitioner Young was in favor of it. (Special Findings, No. 13, p. 242.)

How can it be argued that these Preferred Stockholders were prejudiced by the dismissal of an appeal which served to delay a Reorganization that they all favored?

Of course the real truth of the matter appears in this Record with entire clarity. The dismissal did *not* prejudice or harm the corporation at all, or the interests of the Preferred Stockholders at all.

The only harm or prejudice was to Petitioner Young, in his private vendetta against Bradley and Murphy and his campaign to oust them from control of The Higbee Company.

IV. ASSUMING HOWEVER (FOR THE SAKE OF ARGUMENT) THAT THERE WAS A DUTY TO ACCOUNT OVER TO THE CORPORATION OR TO THE PREFERRED STOCKHOLDERS FOR THE EXCESS PROFITS DERIVED FROM THE SALE OF THE STOCK, IS THIS RIGHT DEFEATED BY THE FURTHER FACTS IN THIS CASE, towit,

(a) The fact that all of the Preferred Stockholders (except only Potts and Boag) approved the Amended Plan of Reorganization; and by

(b) The fact that the sale of the stock for an excessive price was for reasons wholly foreign to the rights or interests of the Corporation or the other Preferred Stockholders; and by

(c) The fact that in an earlier proceeding before The Circuit Court of Appeals, the Petitioner had sought unsuccessfully to intervene in the Potts-Boag appeal and that proceeding serves as a collateral estoppel against the effort by the petitioner to litigate the matter further.

As already pointed out, *all* of the Preferred Stockholders (except only Potts and Boag) voted for approval of the Amended Plan of Reorganization. See memorandum of District Judge, p. 252.

How then can these same Prefered Stockholders be heard to complain of the dismissal of an appeal which put into immediate effect the very Plan of Reorganization which they all desired?

In *Bank v. Flershem*, 290 U. S. 504, 521 (1933) this Court had occasion to consider the rights of security holders who had consented to and approved a Plan of Reorganization which was subsequently held invalid on

appeal; and it was held that such security holders could not have any of the benefits of the successful appeal nor could they complain that the successful appellants came out better than the others.

> "The debenture holders, who by assenting to the Plan, cooperated with the Corporation and the Reorganization Committee, are in no position to complain that these petitioners will fare better than they. Compare *Davis v. Virginia R. and Power Co.*, 229 Fed. 633, 642."

Applying the principle of the *Flershem* case to our case at bar, the *only* persons who could have received the benefits of the appeal were the appellants themselves.

All of the other Prefered Stockholders had disqualified themselves from challenging the Amended Plan of Reorganization.

Since the appellants certainly had the right to dismiss their appeal *so far as their own individual rights recoverable through the appeal*, were concerned, it would seem that under the rule of the *Flershem* case, there is no one with any right to complain about the dismissal of the appeal.

We submit further that the fact that the sale of the stock for a high or excessive price was shown to be for reasons wholly foreign to the interests of the corporation or other preferred stockholders is also fatal to the contentions of the Petitioner.

We suggested at an earlier point in this Brief that the burden was upon the Petitioner to prove that the corporation or the other preferred stockholders had been prejudiced by the sale of the stock and the subsequent dismissal of the appeal. But we now carry the point one step further. Not only did the Petitioner *not* prove (what we conceive to have been part of his case) that the preferred stockholders suffered loss—but on the contrary, it was proved clearly and plainly that they did *not* suffer loss. The

evidence established plainly that the high price paid was because of the private struggle between Young on the one hand and Bradley and Murphy on the other—a struggle in which the corporation and the other preferred stockholders had no concern at all.

Finally, it is in the Record and undisputed, that before the Potts-Boag appeal was dismissed, Petitioner Young appeared before The Circuit Court of Appeals and sought to prevent the dismissal, and asked leave to intervene in the appeal. (54, 71.)

The Circuit Court of Appeals declined to allow him to intervene; and after full hearing, did permit Bradley and Murphy to dismiss the Potts-Boag appeal. (72, 73.)

Should Young be permitted to re-litigate the propriety of this dismissal?

In *U. S. v. Moser*, 266 U. S. 236 (1924) this Court said (p. 242):

> "A fact, question, or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."

The Petitioner filed his application for leave to intervene in the original Potts-Boag appeal (71) and also filed (54) an application for a hearing on the dismissal of the appeal before any action was taken on the appeal.

In support of these applications he filed a long memorandum (56-59) in which he made essentially the same claims that are now made in this proceeding.

The Circuit Court of Appeals on March 11, 1942 (72, 73) decided his contentions adversely and denied him the right to intervene (although he was asking to intervene on behalf of all the Preferred Stockholders) and despite these same contentions, ordered the appeal dismissed.

In the light of these conceded facts how can Petitioner be heard to litigate the same questions further?

See Article by Austin Wakeman Scott on Collateral Estoppel by Judgment, 56 *Harv. L. R.* 1 (1942).

One of two things must be true.

Either the former judgment in the Circuit Court of Appeals was predicated on a determination that Potts and Boag (and their assignees) had the unqualified *right* to dismiss their appeal irrespective of the profits to them in the transaction; *or* the facts of the transaction which were shown to the court (the same facts as are in this Record) were not such as to show any prejudice to the Preferred Stockholders.

Since the former litigation revolved around exactly the same facts as we have now, we submit that upon the simplest and most elementary principles of collateral estoppel by judgment the Petitioner should not now be allowed to re-litigate the matters which he submitted to the Circuit Court of Appeals at the time of the dismissal of the Potts-Boag appeal.

CONCLUSION.

For the reasons stated we submit that the judgment of the lower courts was right and should be affirmed.

Respectfully submitted,

MARVIN C. HARRISON,

PAUL S. KNIGHT,

Attorneys for Respondent
J. F. Potts.